Civ. App. 4/2005

IN THE COURT OF APPEAL FOR SIERRA LEONE

BETWEEN:

SHEIK SALIEU MANSARAY - APPELLANT/RESPONDENT

AND

SORIE JAWARA (Suing by His Attorney Aiah Daniel Konoyima - RESPONDENT

AND

FATMATTA DARAMY JAWARA - THIRD PARTY

CORAM:- HON. JUSTICE S. KOROMA, JSC
HON. JUSTICE P.O. HAMILTON, J.A.
HON. JUSTICE A.N.B. STRONGE, J.A.

SOLICITORS :-

S.M. SESAY ESQ. - FOR APPELLANT
Y. H. WILLIAMS ESQ. - FOR RESPONDENT

JUDGMENT DELIVERED ON THE 3rd DAY OF February 2009
P.O. HAMILTON J.A.

This is an appeal against the Judgment of the Honourable Mrs. Justice J. H. Doherty J. dated 2nd December 2004 refusing to set aside a judgment in default of appearance of the Defendant/Applicant.

Firstly it is appropriate to set out in detail at the commencement of this judgment the steps taken in this action from the issuing of the Writ of Summons until Judgment was delivered on 2nd December, 2004 which then resulted in this appeal.

The Respondent herein was the Plaintiff in the High Court action.

By a Writ of Summons dated 31st December 2003 this action commenced and by a Notice of Motion dated 5th January, 2004 the Plaintiff obtained an interim injunction against the defendant. On 5th February 2004 an order for substituted service of the Writ of Summons was obtained against the Defendant/Appellant and on 13th February 2004 a Conditional Appearance was entered on behalf of the defendant.

On 31st March 2004 the defendant's Defence was filed. By an order of the Court dated 25th March 2004 a third party notice was issued. A reply dated 5th April 2004 was filed. The action was set down for trial on 6th April 2004.

On 16th November 2004 judgment was given and on 24th November 2004 an application was made to set aside the judgment in default of appearance that was obtained on 16th November 2004.

The third party then sought leave to enter appearance by notice of motion dated 3rd February 2005 out of time.

Whilst the proceedings were in this state the trial then proceeded in the absence of the defendant and his Solicitor and judgment was therein given. An application was then made to set aside the judgment.

It is against this background that the Defendant/Appellant has now appealed to this court first on four (4) grounds and latter added another four (4) grounds of appeal. I shall set out all eight (8) grounds of Appeal.

1. The Learned Trial Judge failed to consider the defence filed by the appellant in default of appearance of the appellant at the trial dated 16th November 2004.

2. The Learned Trial Judge failed to consider the merits of the defence filed by the appellant when refusing to set aside the judgment in default of appearance of the appellant at the trial dated 16th November, 2004.

3. The Learned Trial Judge acted on wrong principles in refusing to set aside the said judgment in default of appearance of the appellant at the trial dated 16th November, 2004.

4. The Learned Trial Judge failed to consider that there were third party proceedings which were still then at the interlocutory stage and that the progress of those proceedings had a direct bearing on the main action.

5. That the decision is against the weight of evidence.

6. There was no allegation of forgery in the statement of claim endorsed in the specially endorsed Writ of Summons yet the Learned Trial Judge found that the undated Conveyance is a forgery.

7. In the absence of expert evidence the Learned Trial Judge was wrong in holding that the signatures in the several cards, passport and the purchase he signed in 1982 are different from the signature on the undated Conveyance.

8. The Learned Trial Judge came to the wrong conclusion when she held at page 89 of the records: "I find the defendant had notice of the plaintiff's title prior to signing the purported Conveyance.

The main issues raised in this appeal could be summarized thus:-

From the evidence before the Learned Trial Judge was there conclusive proof that the appellant and his Solicitor were duly served with notice of the proceedings before proceeding to judgment in default of appearance of the defendant and his Solicitor dated 16th November, 2004 taking into consideration the fact that there was a third party proceeding still at its interlocutory stage which said proceedings has an effect on the entire action before the Learned Trial Judge. Was there conclusive evidence before the Learned Trial Judge that the appellant and his Solicitor were served with the necessary notice of the proceedings?

Counsel for the appellant in his argument submitted that the Learned Trial Judge made no effort to ascertain whether the notice was actually served on the appellant and or his Solicitor and that there was an affidavit of service or testimony on oath by the said process server that the notification was actually served. He further submitted that in the absence of proof of such service the proceedings should be set aside and the appeal allowed.

Counsel for the respondent in his reply submitted that the judgment of 11th November, 2004 was regularly obtained and must be upheld relying on Order 25 Rule 1 of the High Court Rules, 1960 (as amended) which reads:

> *"If when the trial is called on, the plaintiff appears but the defendant does not appear the plaintiff may prove his claim so far as the burden of proof lies in him."*

Similarly referring to Order 35 Rule 1 of the Supreme Court Practice, 1999 under the rubric "Effect of Rule" at page 166 it reads:

> *"If, however, the plaintiff appears but the defendant does not appear at the trial the plaintiff may prove his claim so far as the burden of proof lies on him. The proof will be limited to the allegations in the Statement of Claim. The plaintiff having proved his case is entitled to such relief as he claims and to such other relief as is consistent therewith."*

In J.T. Chanrai & Co (S.L.) Ltd. V Palmer 1970 – 71 ALR S.L. 391 Luke J.S.C. in considering this rule held that if the defendant fails to appear at a trial it is the duty of the Judge before allowing the plaintiff to prove his claim, to satisfy himself on the evidence that the pleadings have closed, the action has been entered for trial and the parties or their Solicitors have been notified of the date, time and place fixed for trial; a statement by Counsel for the plaintiff that such notification has been given is not by itself sufficient. (Emphasis mine).

The object of service is to give notice to the defendant/appellant so that he is not taken by surprise in relation to the proceedings. Failure to give notice of proceedings to the adverse party in a case where service of process is required is a fundamental omission which renders such proceedings void.

The guiding principle that is needed in the notification of a defendant or his Solicitor was put by Luke J.S.C. in J.T. Chanrai & Co. (S.L.) Ltd v. Palmer 1970 – 71 ALR 391 at 394 thus: .....

> *"The Judge must in my view be satisfied by evidence either by affidavit or viva voce. A statement by Counsel for the plaintiff that the defendant or his Solicitor has been notified is not evidence and therefore such statement would not be sufficient to satisfy the Judge."*

Page 72 lines 5 to 12 of the records reads as follows:-

> *"This is the third time that they have come after the order for substituted service were granted.....Notices ordered were complied with by the Registrar of this court but the defendant and his Solicitor have failed to appear therefore treating this court with levity and contempt."*

Does a mere note on the records that the Registrar of the court has complied with the Order regarding notice to the defendant/appellant enough for the court to proceed with the proceedings? I am bold to answer in the negative. As Rhodes-Vivour JSC in the Nigerian case of Anyoha and Ors Ors.v Lawrence Chuku (2008) 4 NWLR 31 at 45 said:

> *"An affidavit of service is necessary when the defendant does not acknowledge service.*
> *Conversely when the defendant has acknowledge service, the court can dispense with an affidavit of service. An affidavit of service is an affidavit usually sworn to by the Bailiff (process server) indicating*

how and where he served the defendant. It is to convince the court that the defendant on whom the processes are to be served, were duly served. An affidavit of service becomes reputable presumption of service if the defendant says he was not served.....The burden of proving service lies on the person (usually the plaintiff) asserting that there was service and this is done by inviting the parties to call oral evidence."

It is well settled that where there is an affidavit of service that is not disputed it therefore presupposes that the defendant/appellant has been served. Failure to effect service of proceeding as dictated by the rules of court is a defect which goes to the roots of the trial or proceedings and thus renders the entire proceedings a nullity. This is so because where there is a failure to serve court processes or proof of such service on a party; it is my humble opinion that the court is deprived of jurisdiction upon the matter.

In the light of all I have been saying especially the fact that there was no proof of service by affidavit before the Learned Trial Judge nor was oral evidence called to prove that neither the defendant/appellant nor his Solicitor was served. I am of the considered view that the instant appeal is meritorious and would therefore allow the said appeal and hold that the judgment dated 16th November, 2004 was a nullity and is hereby set aside.

The power of the Court of Appeal to remit a case to the High Court for retrial is derived from the provisions of Rule 21 of the Court of Appeal Rules 1985 (Public Notice No. 29 of 1985). It is clear form the provisions contained in this rule that the power to order a retrial in any event is discretionary.

Consequently, an appellate court before deciding to make an order for retrial should satisfy itself that the other party is not thereby being wronged to such an extent that there would be a miscarriage of justice.

Ground 6 of the grounds of appeal reads:

> *"There was no allegation of forgery in the Statement of Claim endorse in the specially endorsed Writ of Summons yet the Learned Trial Judge found that the undated Conveyance is a forgery."*

In exercising the Court's discretion to order a retrial the paramount and only consideration is to ensure that justice is done to both parties. It is clear in this present case that the Learned Trial Judge did rely fundamentally on the allegation of forgery in relation to the alleged Conveyance in arriving at her decision. This allegation of forgery was neither pleaded, nor proved, and failed to decide relevant issues and make proper findings based on pleading in this matter. (Emphasis mine).

This being so I do not think the judgment ought to stand and a retrial is therefore ordered. I shall order that cost of the court below be the Respondent's, such cost to be taxed. Each party bears its own cost in this appeal.

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Hon. Justice P.O. Hamilton (Presiding)

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Hon. Justice S. Koroma, JSC